

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-830

COMMONWEALTH

vs.

DAVID W. PERRY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, David W. Perry, timely filed this interlocutory appeal from an order denying his motion to suppress evidence arising from a motor vehicle stop during which troopers, aided by a dog from the K-9 unit, located certain controlled substances. The defendant was charged with possession of class B and E substances in violation of G. L. c. 94C, § 4. He filed a motion to suppress, which a judge denied. On appeal, the defendant claims that the judge erred in denying the motion because the trooper who stopped his vehicle impermissibly extended the scope and duration of the search.¹ We affirm.

¹ The defendant also argues that there was insufficient evidence regarding the reliability of the dog that was brought to the scene to sniff the defendant's car. The defendant raised this argument in a supplementary memorandum filed after the evidentiary hearing on his motion -- he did not raise it in his

Background. We summarize the judge's findings of fact, supplemented by uncontroverted testimony and representations that are consistent with the findings. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015). A Massachusetts State trooper stopped the defendant after receiving a telephone call about an erratic driver, and after himself observing the defendant's moving vehicle straddling two lanes. The trooper noticed that the defendant's speech was slurred and "accelerated," but he did not smell alcohol on the defendant's breath. The defendant explained that his poor night vision caused him to move between lanes. By approximately 10:45 P.M. the defendant had passed four field sobriety tests (FSTs). Nevertheless, the defendant exhibited a "very accelerated" perception of time, which the trooper believed indicated drug impairment, based on the trooper's training and experience.

motion to suppress. Further, the judge did not address this argument in his memorandum. Accordingly, the issue is waived. See Commonwealth v. Silva, 440 Mass. 772, 781-782 (2004) (requirement in Mass. R. Crim. P. 13 [a] [2] that motion to suppress state grounds on which it is based "alerts the judge and the Commonwealth to the suppression theories at issue, and allows the Commonwealth to limit its evidence to these theories. There is no reason for the Commonwealth to extend unnecessarily the length of the suppression hearing by presenting evidence on issues not raised by the defense. . . . Therefore, the doctrine of waiver precludes the defendant from raising [the issue on appeal]").

The trooper called for a drug recognition expert (DRE) to assist him in assessing the defendant's impairment. The trooper learned that there was no DRE on duty in the area, but that an off-duty DRE might be available. At approximately 10:55 P.M., while awaiting confirmation that a DRE was available, the trooper requested assistance from a K-9 unit.² A trooper and dog from the K-9 unit arrived at the scene approximately ten minutes later, at 11:05 P.M. The dog, Tank, performed an external scan of the defendant's vehicle, and attempted to jump through the open driver's side window during his second lap around the vehicle.³ This change in behavior indicated to the K-9 trooper that Tank had detected narcotics. After Tank circled the vehicle for the third time, the K-9 trooper placed Tank in the vehicle to perform a "free scan" to locate the narcotics.⁴ Tank

² The trooper could not recall the exact time that he requested the DRE, but testified that he requested the K-9 trooper while waiting to hear whether a DRE was available. At some point, the trooper received word that a DRE was not available to assist, but the record is unclear as to when that occurred.

³ The K-9 trooper explained that when performing an external scan, Tank walks around the vehicle once "to get his energy out," a second time as a "free scan for him to go around the vehicle on his own to attempt to locate narcotics," and a third time where the K-9 trooper points out areas that he wants Tank to check.

⁴ The K-9 trooper explained that "the free scan is when the dog is put inside the vehicle on his own in an attempt to locate the source of narcotics. If he doesn't locate anything, we'll do a detail scan of it where I'll point out areas of interest."

bit the defendant's cell phone, and then alerted to a backpack on the floor, which contained several pills and a glass pipe.

Standard of review. "[I]n reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law" (quotation and citation omitted). Commonwealth v. Tremblay, 480 Mass. 645, 652 (2018). "The Commonwealth bears the burden of demonstrating that the actions of the police officers were within constitutional limits." Commonwealth v. Meneus, 476 Mass. 231, 234 (2017).

Discussion. Although on appeal the defendant does not challenge the lawfulness of the vehicle stop or the trooper's exit order, we discuss some factual and legal aspects of those events in order to provide necessary context.

"'Erratic' driving that violates the civil motor vehicle code may give rise to a reasonable suspicion that a driver is impaired, permitting an investigatory stop." Commonwealth v. Daniel, 464 Mass. 746, 756 (2013). Reasonable suspicion must be "based on specific, articulable facts and reasonable inferences therefrom, that an occupant of the . . . motor vehicle had committed, was committing, or was about to commit a crime" (quotation and citation omitted). Commonwealth v. Edwards, 476 Mass. 341, 345 (2017). We evaluate reasonable suspicion

objectively, based on the totality of the circumstances. See Meneus, 476 Mass. at 235; Commonwealth v. Wright, 85 Mass. App. Ct. 380, 384 (2014). We do not require officers to know "the specific type of criminal activity . . . afoot" when they are "mak[ing] judgments about what resources are readily available to [them] that might quickly dispel or confirm [their] suspicion that the driver is involved in some form of criminal activity, . . . particularly . . . in a swiftly developing situation" (quotation and citation omitted). Commonwealth v. Feyenord, 445 Mass. 72, 80 (2005), cert. denied, 546 U.S. 1187 (2006).

Nevertheless, an officer's conduct during such a stop must be "lawfully related in scope to the circumstances that justified the stop in the first place, or to unfolding circumstances as they develop." Feyenord, 445 Mass. at 90 (Greaney, J., concurring). See Wright, 85 Mass. App. Ct. at 383. Accordingly, an officer may not prolong a stop "longer than reasonably necessary to effectuate the purpose of the stop" unless there are "grounds for inferring that either the operator or his passengers were involved in the commission of a crime . . . or engaged in other suspicious conduct" (quotations and citations omitted). Commonwealth v. Cordero, 477 Mass. 237, 241-242 (2017). An officer cannot hold a driver "indefinitely until all avenues of possible inquiry have been tried and exhausted," and must end the seizure "when tasks tied to the

traffic infraction are – or reasonably should have been – completed" (quotations and citations omitted). Id. at 242. "In assessing whether a detention is too long in duration to be justified as an investigative stop, we . . . examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant" (quotation and citation omitted). Feyenord, supra at 81.

Accordingly, if an officer has a reasonable suspicion of criminal activity, the officer may detain the defendant while awaiting the arrival of a drug-sniffing dog if doing so is "proportional to the escalating suspicion that emerged over the course of the stop" (quotation and citation omitted).⁵ Feyenord, 445 Mass. at 81. See Illinois v. Caballes, 543 U.S. 405, 406-408 (2005) (defendant who was lawfully stopped for traffic violation was not unreasonably detained when entire incident -- from stop of vehicle to arrest of defendant after dog alerted to drugs -- lasted less than ten minutes); Feyenord, supra at 78-79, 81-82 (defendant who was lawfully stopped for traffic violation, whose failure to produce driver's license,

⁵ A "dog sniff of a properly stopped vehicle is not a search under art. 14" of the Massachusetts Declaration of Rights because a defendant does not have an objectively reasonable "expectation of privacy in the odor of [narcotics] emanating from his car." Feyenord, 445 Mass. at 82-83.

inconsistent answers, and nervousness raised reasonable suspicion of criminal activity, was not unreasonably detained when held "in the rear of [a] cruiser for fifteen to twenty minutes while awaiting the arrival of the canine unit" and his "total detention lasted no longer than thirty minutes"). "The critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff prolongs – i.e., adds time to – the stop" (quotations and citation omitted). Rodriguez v. United States, 135 S. Ct. 1609, 1616 (2015).

Here, the judge properly concluded that the trooper did not exceed the permissible scope of the stop. See Feyenord, 445 Mass. at 90 (Greaney, J., concurring); Wright, 85 Mass. App. Ct. at 383. There is no dispute that the trooper lawfully stopped the defendant for erratic driving. Approximately ten minutes after receiving a report of an "erratic operator," the trooper observed the defendant "splitting two lanes" in a car matching the caller's description. See G. L. c. 89, § 4A (requiring drivers to keep their vehicles "entirely within a single lane"). The trooper stopped the defendant's car to determine why the defendant was driving unsafely and whether he would continue to pose a risk to others on the road. See Feyenord, supra at 75. See also Commonwealth v. Davis, 63 Mass. App. Ct. 88, 89 (2005) (Davis I) ("The need to protect or preserve life or avoid

serious injury [by stopping a motor vehicle] is justification for what would be otherwise illegal absent an exigency or emergency" [citation omitted]).

There is also no dispute that the trooper lawfully ordered the defendant to exit his vehicle to perform FSTs. The defendant admitted to the trooper that he knew that he was straddling two lanes, and attributed his driving to "poor night vision." Given the trooper's observations of the defendant's driving and the defendant's concession to unsafe driving, the trooper appropriately requested that the defendant exit his vehicle to perform FSTs. See Commonwealth v. Meneide, 89 Mass. App. Ct. 448, 452 (2016) (exit order permissible if officer has safety concerns).

Moreover, the trooper's conduct throughout the stop remained focused on determining whether the defendant could safely operate a motor vehicle. See Feyenord, 445 Mass. at 90 (Greaney, J., concurring); Wright, 85 Mass. App. Ct. at 383. Although the defendant passed the FSTs, the trooper observed that the defendant "had a very accelerated perception of time" and "slurred" speech. Contrast Cordero, 477 Mass. at 246 (driver should have been released where investigation did not create reasonable suspicion). That behavior, in addition to the trooper's earlier observations of the defendant's erratic driving, contributed to the trooper's reasonable suspicion that

the defendant may have been under the influence of narcotics.⁶ See Meneus, 476 Mass. at 235 (reasonable suspicion evaluated on "totality of the facts"). The trooper did not have the training necessary to accurately assess whether the defendant was under the influence of narcotics, so he properly requested assistance from both a DRE and a K-9 unit to help "dispel or confirm his suspicion" about the defendant's impairment.⁷ Feyenord, supra at 80. Because the trooper was evaluating whether the defendant was too impaired to drive, none of his actions exceeded the permissible scope of the stop. See id.; Wright, supra.

⁶ The defendant relies on Commonwealth v. Ketchum, 87 Mass. App. Ct. 1135 (2015), and Davis v. Commonwealth, 484 S.W.3d 288 (Ky. 2016) (Davis II), in support of his contention that the officer should have ended the seizure after the defendant passed the FSTs. Neither case is binding on our decision. Moreover, the defendants in Ketchum and Davis II, unlike the defendant here, did not exhibit signs of possible drug impairment. See Ketchum, supra ("Once the defendant passed the field sobriety tests . . . the officer's concern that the defendant was operating under the influence of marijuana was obviated"); Davis II, supra at 294 ("no evidence suggests that Appellant's . . . behavior otherwise exhibited any characteristics associated with drug or alcohol intoxication from which an officer might reasonably believe further investigation was necessary"). Additionally, FSTs are designed to "detect alcohol impairment," not impairment by narcotics. Commonwealth v. Gerhardt, 477 Mass. 775, 779 (2017).

⁷ The fact that the Commonwealth did not ultimately charge the defendant with operating under the influence of narcotics does not detract from the officer's reasonable suspicion. See Commonwealth v. Dyette, 87 Mass. App. Ct. 548, 555 (2015) ("Reasonable suspicion is not lacking even if the objective factual basis for reasonable suspicion is shown after the fact to be erroneous").

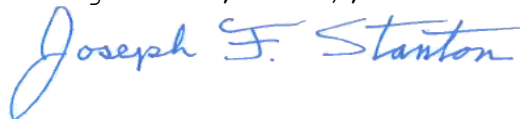
Additionally, given the evidence of the defendant's impairment, the judge correctly concluded that the trooper did not unduly prolong the duration of the stop by requesting a DRE and K-9 unit. See Feyenord, 445 Mass. at 78-79. The trooper finished administering the FSTs at approximately 10:45 P.M., and subsequently requested a DRE. At approximately 10:55 P.M., while awaiting confirmation whether a DRE was available, the trooper requested assistance from a K-9 unit. The K-9 unit arrived at the scene approximately ten minutes later, at 11:05 P.M., meaning that the trooper detained the defendant approximately twenty additional minutes following the conclusion of the FSTs, to determine whether the defendant posed a threat to public safety. See id. at 81-82. Given the evidence of impaired driving, which poses a serious threat to the public, detaining the defendant for an additional twenty minutes was a reasonable and proportional measure to effectuate the purposes of the stop. See id. at 81. See also Rodriguez, 135 S. Ct. at 1616; Commonwealth v. Davis, 481 Mass. 210, 215-216 (2019) (Davis III) (statute prohibiting impaired driving "protect[s] the public from drivers whose judgment, alertness, and ability to respond promptly and effectively to unexpected emergencies are diminished because of the consumption of alcohol or drugs" [quotations and citations omitted]). Furthermore, once the K-9 unit arrived on the scene and the dog alerted to narcotics in

the defendant's vehicle, the troopers had probable cause to search the vehicle. See Wright, 85 Mass. App. Ct. at 385 ("once [the dog from the K-9 unit] indicated the presence of drugs, the troopers had probable cause to search the vehicle").

Conclusion. We discern no error in the judge's denial of the defendant's motion to suppress, given the evidence supporting the trooper's reasonable suspicion that the defendant was impaired, and the relatively short delay while awaiting assistance from the DRE and K-9 unit. See Feyenord, 445 Mass. at 78-79.

Order denying motion to
suppress affirmed.

By the Court (Maldonado,
McDonough &
Englander, JJ.⁸),



Clerk

Entered: August 28, 2019.

⁸ The panelists are listed in order of seniority.